

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC**

<b>In the Matter of</b>	)	
	)	
<b>Exclusive Service Contracts for Provision of</b>	)	
<b>Video Services in Multiple Dwelling Units and</b>	)	<b>MB Docket No. 07-51</b>
<b>Other Real Estate Developments</b>	)	

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**COMMENTS OF THE FIBER-TO-THE-HOME COUNCIL  
IN THE FURTHER NOTICE OF PROPOSED RULEMAKING**

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## **SUMMARY**

Fiber-to-the-Home (“FTTH”) networks provide the ultimate in transmission capabilities for customers, and, once deployed, these capabilities can be readily upgraded. At the same time, FTTH networks, because new plant must be built all the way from the central office to the premises, are expensive to deploy. It was not that long ago that providers concluded that these substantial costs outweighed fiber’s promise, and few systems were deployed. Yet, of these systems, a large percentage were in real estate developments, where the substantial number of homes being built coupled with the ability to obtain some sort of exclusivity or bulk-billing arrangement made deployment more cost-effective. In a very real sense, these developments were incubators of today’s FTTH technology and networks.

As the costs of deployments have decreased and regulatory barriers have fallen, the number of FTTH networks in the United States has increased dramatically. But, even today, the tension between cost and promise remains, and real estate developments involving exclusivity or bulk-billing arrangements continue to be an important part of FTTH growth. There are sound public policy reasons for the Commission to permit the arrangements to continue.

The simple fact is that FTTH deployments continue to involve substantial, upfront costs, and, without some way to lower costs or some guarantee of demand, they are potentially too risky to undertake. In addition, many of the providers of these networks are smaller, more recent entrants into the market. If these providers can gain a toehold in these developments, they have the potential to bring real FTTH competition elsewhere in the market. Finally, the consumer benefits of FTTH continue to be so significant and the technological innovations are so impressive that they are a vital element of our broadband future. The FTTH Council urges the Commission to recognize the great benefits that flow from deploying FTTH networks and not

impose new regulations prohibiting exclusivity or bulk-billing arrangements with real estate developers or home owners associations. The FTTH Council also believes that, even if the Commission found it in the public interest to adopt such regulations, it lacks the legal authority to do so.

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The Fiber-to-the-Home Council (“FTTH Council”), through its undersigned counsel, hereby respectfully submits its comments to the Federal Communications Commission (“Commission”) in response to the Further Notice of Proposed Rulemaking (“*MDU FNPRM*”) issued in the above-captioned proceeding.<sup>1</sup>

The FTTH Council is a non-profit organization established in 2001. Its mission is to educate the public and government officials about fiber-to-the-home (“FTTH”) and to promote and accelerate FTTH deployment and the resulting quality of life enhancements FTTH networks make possible. The FTTH Council’s members represent all areas of the broadband access industry, including telecommunications, computing, networking, system integration, engineering, and content-provider companies, as well as traditional service providers, utilities,

and municipalities.<sup>2</sup> Of particular relevance to the *MDU FNPRM*, some members of the FTTH Council construct FTTH networks in private real estate developments or other MDU environments. These networks are then used by either affiliated or unaffiliated multichannel video programming distributors (“private MVPDs”). In many instances, these infrastructure developers or the private MVPDs have entered into agreements either with exclusivity clauses or bulk-billing arrangements to provide FTTH networks in real estate developments or communities.<sup>3</sup> The objectives of the FTTH Council in these comments are to educate the Commission on the consumer benefits and economics of these FTTH deployments and urge the Commission to refrain from adopting any new regulations that would deter FTTH growth just as it is gaining momentum.

## **I. Introduction**

FTTH networks today provide the ultimate in transmission capability for customers, and, once deployed, the capabilities of these networks can be readily upgraded by changing the transmission electronics so that they are in effect “future proof.” At the same time, FTTH networks, because new plant must be built all the way from the central office to the premises, are expensive to deploy. It was not that long ago that providers concluded that these substantial costs outweighed fiber’s promise making deployments far too risky, and few systems were

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<sup>1</sup> *In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Further Notice of Proposed Rulemaking, MB Docket No. 07-51, Rel. November 13, 2007.

<sup>2</sup> As of today, the FTTH Council has more than 150 entities as members. A complete list of FTTH Council members can be found on the organization’s website, <http://www.ftthcouncil.org>.

<sup>3</sup> These FTTH network builders and the private MVPDs are not subject to section 628 for varying reasons, including that these networks are constructed solely in private rights-of-way. See, the exemption in the definition of “cable system”(47 U.S.C. §522 (7)(B)).

deployed. Yet, of these systems, a large percentage were in new real estate developments, where the large number of homes being built coupled with the ability to obtain an exclusivity or bulk-billing arrangement made deployment more cost-effective. In a very real sense, these developments were incubators of today's FTTH technology and networks.

As the costs of deployments have decreased and regulatory barriers have fallen, the number of FTTH networks in the United States has increased dramatically. But, even today, the tension between cost and promise remains, and real estate developments involving exclusivity or bulk-billing arrangements continue to be an important part of increasing FTTH deployment. There are sound public policy reasons for the Commission to permit the arrangements to continue.

The simple fact is that FTTH deployments continue to involve substantial, upfront costs, and, without some way to lower costs or some guarantee of demand, they are a risky investment – potentially too risky to undertake. In addition, many of the providers of these networks are smaller, more recent entrants into the market. If these providers can gain a toehold in these developments, they have the potential to bring real FTTH competition elsewhere in the market. Finally, the consumer benefits of FTTH continue to be so significant and the technological innovations are so impressive that they are a vital element of our broadband future. It is for that reason that the Commission itself decided to single out FTTH networks and lower barriers to their deployment in the *Triennial Review Order*.<sup>4</sup> The FTTH Council urges the Commission to

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<sup>4</sup> *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, and Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Dockets 01-338, 96-98, and 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, Rel. Aug. 21, 2003 at ¶274.

once again recognize the great benefits that flow from deploying FTTH networks and not impose new regulations prohibiting exclusivity or bulk-billing arrangements with real estate developers or home owners associations. The FTTH Council also believes that, even if the Commission found it in the public interest to adopt such regulations, it lacks the legal authority to do so.

**II. Because FTTH networks have such tremendous transmission capabilities and because we are still at the beginning stages of deployments in the U.S., the Commission should encourage all providers to accelerate construction of these advanced broadband networks, including in real estate developments.**

FTTH technology has a clear advantage over other transmission media in that “it supports nearly unlimited bandwidth.”<sup>5</sup> This enables the service provider to support a vast array of high-definition video programming and two-way Internet access at speeds 10 times greater than current offerings. It also enables the provider “to upgrade the system...to provide higher bandwidth with little or no change to the overall architecture.”<sup>6</sup> This factor becomes especially important given the constantly increasing demand for video and other large-file content. In addition to its superior bandwidth, FTTH networks tend to have lower operating costs, particularly with more passive systems. While these advantages are significant, FTTH networks are at the beginning stages of mass deployment because of the substantial initial capital cost.

Deployments of FTTH networks in the U.S. have grown dramatically over the past several years, especially with Verizon’s aggressive deployment of FiOS. Yet today, despite the

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<sup>5</sup> *Fiber to the Home: Technological Advantage with Economic Credence*, M. Mahmoudi, Corning Inc., Corning Optical Fiber’s Guidelines Online Magazine, Vol. 12, 2006, at 2 (<http://www.ftthcouncil.org/documents/523450.pdf>). *It’s All About Access – A Comparison of Fiber vs Copper in 2008*, Piyush Sevalia, VP of Marketing, Ikanos Communications, Converge Network Digest, Jan. 7, 2008 ([www.convergedigest.com/bp/bp1.asp?ID=503&ctgy=Loop](http://www.convergedigest.com/bp/bp1.asp?ID=503&ctgy=Loop)) (“*Ikanos Article*”).



many billions of dollars spent, FTTH networks only pass about 10% of the nation's households.<sup>7</sup> This number will continue to increase, but, at the current rate of deployment, it will take well-over a decade and many tens of billions of dollars to bring fiber to most households. This "deliberate" deployment comes at the very time consumers are demanding more bandwidth, content and applications providers are rolling out new video-intensive applications, and other countries are taking advantage of fiber technology to become world economic leaders. It is for that reason the FTTH Council believes the U.S. has no choice but to encourage all types of providers to expedite the deployment of fiber to consumers.

One key way to accelerate the deployment of FTTH networks is by ensuring new communities are wired with this technology. Each year, approximately 2 million new homes are built in the U.S., and 50% of those are grouped in planned unit (or master-planned) communities.<sup>8</sup> These communities have already proven to be an excellent source of FTTH growth. The provider Broadweave constructed one the first FTTH networks in such a community in 1999,<sup>9</sup> and by 2005, there were almost 100 such planned unit community deployments or about 17% of all FTTH deployments.<sup>10</sup> Today, planned unit communities with FTTH networks can be found in such diverse locations as Topeka, Kansas, McCall, Idaho, and

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<sup>6</sup> *Id.*

<sup>7</sup> See, *FTTH/FTTP Update, October, 2007*, RVA LCC at 7 (<http://www.ftthcouncil.org/documents/358826.pdf>), and *FTTH/FTTP Update, November, 2007*, RVA LLC at 16 (<http://www.ftthcouncil.org/documents/715673.pdf>).

<sup>8</sup> *FTTH Carrier Deployment Models – One Size Does Not Fit All!*, Diane Kruse, President, Zoomy Communications, *The FTTH Prism*, Vol. 3, No. 2, Oct. 2006 at 46 ([http://www.baller.com/pdfs/FTTH\\_Prism-Oct06.pdf](http://www.baller.com/pdfs/FTTH_Prism-Oct06.pdf)).

<sup>9</sup> See Broadweave Webpage at <http://www.broadweave.com/historyAndMilestones.htm>.

<sup>10</sup> *Fiber Systems Triple in a Year*, Steven S. Ross, *Broadband Properties*, Nov. 2005 at 31.

Biloxi and Jackson, Mississippi. Greenfield Communications, for instance, has deployed FTTH networks in 11 planned unit communities, has 11 under design, and has 22 under contract, enabling it to reach more than 250,000 households.<sup>11</sup> Most importantly for these comments, for many of these developments, the construction and operation of an FTTH network only became economically feasible because the provider was able to obtain an exclusivity or bulk-billing arrangement with the real estate developer or home owner's association. Finally, and not insignificantly, customers benefit by having lower rates. Bulk-billing arrangements, for instance, have enabled homeowners to mass their buying power for voice, data, and video services and obtain rates that are approximately 30% lower than those of incumbent providers.<sup>12</sup> Thus, with such substantial consumer benefits at stake, the Commission should think twice before imposing regulations that may deter FTTH investment.

**III. A critical factor in making FTTH network deployments in real estate developments economically feasible is ensuring sufficient demand through exclusivity and bulk billing arrangements.**

Since 2001, the cost of deploying FTTH (or first-installed cost) has decreased significantly – from an average of approximately \$4,500 per home connected to about \$1,500 today (without including the cost of inside-wiring and set-boxes).<sup>13</sup> In contrast, a typical hybrid fiber-coax network used by the cable provider costs materially less in initial costs. Thus, given

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<sup>11</sup> See, Greenfield Webpage at [http://www.egreenfield.com/Aboutus\\_companyIF.htm](http://www.egreenfield.com/Aboutus_companyIF.htm).

<sup>12</sup> See, Connexion Webpage at [www.connexiontechnologies.net/cnxtech/faq](http://www.connexiontechnologies.net/cnxtech/faq).

<sup>13</sup> *The Challenges Associated with a Successful FTTH Deployment*, Rob Whitman, Corning Cable Systems, Broadband Properties, Sept. 2007 at 53 ([http://www.broadbandproperties.com/2007issues/september07/whitman\\_sep.pdf](http://www.broadbandproperties.com/2007issues/september07/whitman_sep.pdf)). (“Whitman Article”). Also, see *Ikanos Article*.

the same level of penetration and operating costs, it will take longer for the FTTH network provider to reach break-even.<sup>14</sup>

However, if the provider can accelerate penetration or otherwise ensure demand, FTTH networks can become more economically feasible – and provide the additional consumer benefits that come from a “future-proof” broadband network. The simple fact is that “FTTH providers need to have higher take rates for the buildout to be feasible.”<sup>15</sup> This concern about accelerating penetration becomes even more important in new real estate developments, where homes may be built over many years and where construction may occur in widely different locations at the same time. This means that the service provider, to take advantage of open trenches, deploys much of the plant far in advance of the construction of most of the homes. One industry expert has found that in FTTH buildouts “approximately 50 percent of total capital for the project [must be expended] to ‘light’ the first home.”<sup>16</sup> It is no wonder in such a situation that construction is not often undertaken without some guarantee of demand, for instance, through exclusivity clauses or bulk-billing arrangements. Thus, any effort by the Commission to adopt rules constraining the ability of private FTTH infrastructure or service providers to enter into exclusivity or other related clauses with real estate developers has a likelihood of slowing the deployment of these networks at a time when the Commission is seeking to encourage them.

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<sup>14</sup> *FTTH Design for Residential Real Estate Development*, Corning Cable Systems Whitepaper, Nov. 2006 at 1-2 ([http://www.corningcablesystems.com/web/library/litindex.nsf/\\$ALL/EVO-687-EN/\\$FILE/EVO-687-EN.pdf](http://www.corningcablesystems.com/web/library/litindex.nsf/$ALL/EVO-687-EN/$FILE/EVO-687-EN.pdf)).

<sup>15</sup> *Weighing in on Exclusive Contracts for Multiple Dwelling Units*, Diane Kruse, Zoomy Communications, *The FTTH Prism*, Vol. 5, No. 1, Jan, 2008 at 21 ([http://www.chaffeeoptics.com/nwsltr/FTTH\\_Prism\\_Ver5\\_Vol1.pdf](http://www.chaffeeoptics.com/nwsltr/FTTH_Prism_Ver5_Vol1.pdf)).

<sup>16</sup> *Whitman Article* at 54.

It also has the potential to harm new entrants that use entry into these smaller communities as a launching pad to providing service elsewhere in the region and around the country.

**IV. The Commission does not have legal authority to regulate agreements that FTTH deployers or MVPDs not subject to section 628 enter into with real estate developers or similar or related entities.**

Nowhere in the *MDU FNPRM* does the Commission offer legal justification for prohibiting exclusivity or bulk-billing arrangements in real estate developments by FTTH providers not subject to section 628. If the Commission only poses a series of questions, it is for good reason. The Commission lacks any statutory authority – either direct or ancillary -- to regulate the agreements between infrastructure deployers or private MVPDs and developers and home owner's associations in planned unit developments (or, for that matter, any multiple dwelling unit property).

To begin with, the Commission does not have any authority to regulate entities that merely construct or deploy wireline networks and do not provide (transmit) communications services. This is doubly the case when the deployment of the wireline facilities is limited to private property and effectively constitute private networks.

As for private MVPDs, any contention that the Commission has direct authority under either Title VI or elsewhere in the Communications Act or other statutes to regulate the activity of these entities is easily dismissed. The Communications Act authorizes regulation of these entities in very select instances – none of which extend to their operations. The only sections of Title VI that apply to private entities are those that deal with such issues as cross-ownership with cable operators<sup>17</sup> and equal employment opportunities.<sup>18</sup> Moreover, there is no

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<sup>17</sup> See 47 U.S.C. §533(a).

<sup>18</sup> See 47 U.S.C. §554(h).

express statutory authority given to the Commission permitting it to adopt regulations that generally apply to private MVPDs and certainly none that deal with exclusivity clauses or bulk-billing. It is thus not surprising that the Commission itself notes, at the outset of the *MDU FNPRM*, that the “Report and Order is limited to those MVPDs covered by Section 628.”<sup>19</sup>

Nor can the Commission find any express authority to adopt such regulations in other parts of the Communications Act or other statutes. The only provision that has even a tenuous linkage to private MVPDs is section 207 of the Telecommunications Act of 1996, which deals with Over-the-Air Reception Devices. This provision is particularly noteworthy because it provides express authority for the Commission to adopt rules to give tenants in MDUs access to DBS and other wireless reception devices for the purpose of receiving video programming from these over-the-air MVPDs. However, nowhere does it provide authority for the Commission to adopt rules permitting tenants to access wireline MVPDs or imposing requirements on private MVPDs in MDUs. If Congress intended for the Commission to extend its authority more directly over private MVPDs, it surely could have done so in light of these other targeted provisions.

Finally, the Commission does not have ancillary authority that would permit it to adopt rules regarding exclusivity and other arrangements by infrastructure deployers or private MVPDs with MDU owners or related-entities. For the Commission to exercise its ancillary authority in Title I or section 303(r), it must demonstrate both that its general authority covers entities constructing and operating FTTH networks in real estate developments and that the

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<sup>19</sup> *In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order, MB Docket No. 07-51, Rel. Nov. 13, 2007 at ¶61.

action is linked to its efforts to promote competition among video providers.<sup>20</sup> As recent court decisions have made clear, the Commission bears a heavy burden in demonstrating that it meets both elements when trying to regulate an entity over which Congress did not directly give it jurisdiction. For instance, in the “video description service” decision, the Court ruled that the Commission’s reliance on its public interest authority was insufficient since it “does not otherwise have the authority to promulgate the regulations at issue.”<sup>21</sup> This holding was reiterated by the D.C. Circuit in the “Broadcast Flag” decision, which voided those proposing rules because the “rules are ancillary to nothing.”<sup>22</sup>

In regard to the rules proposed in the *MDU FNPRM*, there is nothing in Title I that gives the Commission authority to generally regulate infrastructure deployers or private MVPDs or exclusivity arrangements entered into by these entities. In addition, the Commission has no basis for concluding that regulation would be required to enhance competition among video providers. In fact, as demonstrated in these comments, current industry practices enhance competition. Consequently, there is no statutory foundation upon which the Commission’s generic authority (which, as noted, does not exist for private MVPDs) can validly attach itself.

## **V. Conclusion**

As noted in these comments, the FTTH Council has demonstrated that exclusivity clauses and bulk-billing arrangements forward the deployment of FTTH networks in real estate developments, producing significant immediate consumer benefits and promoting competition by providing a basis from which new entrants can bring competition elsewhere in the market. In

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<sup>20</sup> See, *United States v. Southwestern Cable Company*, 392 U.S. 157, 167, 178 (1968).

<sup>21</sup> *Motion Picture Ass’n of America, Inc. v. FCC*, 309 F. 3d 796,806 (D.C. Cir. 2002).

<sup>22</sup> *American Library Ass’n v. FCC*, 406 F. 3d, 691,692 (D.C. Cir 2005).

addition, even if the Commission had sufficient policy bases to act, it lacks legal authority. For these reasons, the FTTH Council urges the Commission to refrain from adopting any regulations to prohibit or limit such arrangements with private MVPDs.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Thomas W. Cohen", written over a horizontal line.

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